IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Phulle Khan and others.
vs.
Balu Khan and others.

S.B.CIVIL SECOND APPEAL NO.42/2006 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 12.9.2005 PASSED BY SHRI SRIKRISHAN JOSHI, ADDITIONAL DISTRICT JUDGE, NAGAUR IN CIVIL APPEAL DECREE NO.16/2003.

DATE OF JUDGMENT ::: 2.1.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. J Gehlot, for the appellants.

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BY THE COURT:

Heard learned counsel for the appellants.

The plaintiffs/respondents no.1 and 2 filed a suit for declaration, possession and injunction against the defendants (appellants and the respondents no.3 to 6) alleging that the plaintiffs are the owners of the property in dispute and the defendants illegally encroached upon the property in dispute.

The defendants claimed that the property in dispute was originally belonging to one Phuse Khan who had three sons. Two of them are the plaintiffs and one was Heer Singh. Heer Singh sold the property to Kayamkhani Samaj through the appellants on 14.1.1957. The defendants also took the objection that the suit is barred by time.

The trial court gave permission to the plaintiffs to maintain the suit by giving permission under Order 1 Rule 8 CPC as the defendants claimed the property was of Kayamkhani Samaj. The trial court after recording evidence, declared the plaintiffs as owners of the property in question and passed the decree for declaration, possession and injunction as well as for removal of some structure which was raised by the defendants no.1, 3 and 4 (appellants) by the judgment and decree dated 15.7.2003.

The appellants preferred appeal against the judgment and decree dated 15.7.2003 of the trial court. The appellate court dismissed the appeal of the present appellants vide its judgment and decree dated 12.9.2005. Therefore, this second appeal by the appellants/defendants no.1, 3 and 4.

According to the learned counsel for the appellants, the plaintiffs filed the suit and did not seek permission from the Court to maintain the suit as representative suit against Kayamkhani Samaj. However, after 12 years, the plaintiffs applied under Order 1 Rule 8 CPC which was granted by the trial court and that too after deciding one issue and the permission was granted without giving any

opportunity of hearing to the appellants. Therefore, according to learned counsel for the appellants, the suit itself was not maintainable and the permission granted by the trial court under Order 1 Rule 8 CPC is illegal.

It is also contended by learned counsel for the appellants that the courts below refused to admit the sale deed dated 14.1.1957 in evidence on the ground that the sale deed was not on proper stamps and was not registered one. It is submitted by learned counsel for the appellants that the appellants paid the requisite stamp duty as per law and as permissible. However, admittedly, the document is not registered one but according to the learned counsel for the appellants, the sale deed dated 14.1.1957 could have been taken into consideration for collateral purpose and should have been admitted in evidence for collateral purpose and that is in support of the appellants' claim of possession over the property in dispute. It is also submitted that the courts below committed error of law in decreeing the suit when the suit property was belonging to Wakf and the Wakf Board has not been impleaded as party.

I have considered the submissions of learned counsel for the appellants and perused the reasons given by the two courts below as well as the facts of the case.

The plaintiffs' suit was found to be within the period of limitation by the courts below. Admittedly, the sale deed dated 14.1.1957 is not a registered document, therefore, no title could have passed upon any person on

the basis of said unregistered sale deed dated 14.1.1957. The payment of stamp duty with penalty may make the document executed on stamp paper but it cannot become a registered document merely because of payment of stamp duty, therefore, the title has not passed to any including the Kayamkhani Samaj and, therefore, the question of it being a Wakf property does not arise.

The trial court granted permission under Order 1 Rule 8 CPC when the defendants were already served and no prejudice has been caused to them because of delay in granting the permission under Order 1 Rule 8 CPC by the courts below. The issue was decided by the trial court after hearing the appellants even before the permission was granted under Order 1 Rule 8 CPC. Therefore, the appellants cannot raise this objection.

In view of the above, no substantial question of law is involved in this appeal. Accordingly, this appeal, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya